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IN THE
Supreme Court of the United States

October Term, 1952

NO. 410

ADAM THOMAS,

Petitioner

vs.

HEMPT BROTHERS, a Partnership,

Respondent

BRIEF FOR RESPONDENT

*On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania.*

ROBERT L. MYERS, JR.,
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ADAM THOMAS,

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

REPORTED OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of Pennsylvania, in *Thomas v. Hempt Brothers*, is reported in 371 Pa. 383. On a prior phase of this litigation the Court of Common Pleas filed an Opinion reported in *Thomas v. Hempt Brothers*, 74 Pennsylvania District and County Reports 213.

JURISDICTION

While petitioner erroneously invokes jurisdiction under 28 U.S.C.A. 1254, respondent calls attention to 28 U.S.C.A. 1257 providing for review by the Supreme Court by writ of certiorari where any right is claimed under a statute of the United States, in case of a final judgment rendered by the highest court of a state in which a decision could be had.

QUESTION PRESENTED

The petition presents the question whether an employee producing local materials for local use in a quarry serving the usual miscellany of local customers is engaged in commerce or in the production of goods for commerce within the meaning of section 7 of the Fair Labor Standards Act of June 25, 1938, 29 U.S.C. A., section 207, in any week when such local materials happen to be used thereafter in new construction or repair of nearby interstate highways or facilities in the same state.

STATEMENT OF CASE

The Supreme Court of Pennsylvania answered in the negative the question presented and affirmed a judgment of the Court of Common Pleas of Cumberland County sustaining the demurrer of Hempt Brothers to a re-amended complaint of Adam Thomas.

Adam Thomas as plaintiff sued Hempt Brothers, his employer, for overtime compensation for a period ending April 15, 1945. Further circumstances as to the course of that litigation in the state courts of Pennsylvania appear at appropriate points in the ensuing argument. In a re-amended complaint (Transcript of Record 3-4, 19, the opinion of the Supreme Court of Pennsylvania, 371 Pa. at pages 385 and 386) Thomas averred that he worked in the quarry of Hempt Brothers near Camp Hill (a suburb of Harrisburg), Pennsylvania, producing and mixing sand, stone and cement, loading concrete mixing trucks and giving directions as to place of delivery to various customers such as the contractor "building the Pennsylvania Turnpike." These were local materials for local delivery, all in Pennsylvania. Such materials were used in the construction and in the repair of facilities of interstate commerce, such as highways, railroads, and airports. On demurrer, without passing on other preliminary objections, it was held that Thomas in his re-amended complaint had again failed to state a cause of action within the provisions of the Fair Labor Standards Act.

Statement of Case

The relevant statute, the Fair Labor Standards Act, 29 U.S.C.A. 207, provides that an employer shall pay overtime compensation, at one and one-half times the regular rate, to "any of his employees who is engaged in commerce or in the production of goods for commerce . . ." As amended October 26, 1949, section 3 of that Act, 29 U.S.C.A. 203 (b) and (j), pocket part, provides that:

" 'Commerce' means trade, commerce, ~~trans~~ transportation, transmission, or communication among the several states or between any State and any place outside thereof. * * *

"* * * an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

ARGUMENT

(1)

The power to issue certiorari should be exercised sparingly and with great caution in cases of peculiar gravity and general importance. This jurisdiction was not conferred merely to settle matters of private interest, or to burden the court's calendar with a case such as the present one where only a limited phase of the litigation would be before the court and the rights of the parties would not be finally determined by a decision reversing a state supreme court on the single issue for which review is sought.

(2)

A reversal would not finally determine the present action. The respondent's demurrer, which was sustained, was filed under Pennsylvania Rule of Civil Procedure 1017 (b) (3) and, as stated in 2 Anderson, Pennsylvania Civil Practice, page 350:

*"If the demurrer is overruled, the demurring party has an absolute right to file a responsive pleading * * *"*

Moreover, in a prior phase of this litigation (see Docket Entries, page 2 of Transcript of Record) on petitioner Thomas' complaint as first amended, where the state court entered judgment on the pleadings for

defendant Hempt Brothers, in *Thomas v. Hempt Brothers*, 74 Pennsylvania District and County Reports, 213, 218 (October 28, 1950), the defendant by answer including new matter, raised substantial defenses under the Portal-to-Portal Act, 29 U.S.C.A. section 251. It should be noted that in 1945 when the Wage-Hour Administrator revoked the prior rulings (upon which Hempt Brothers alleged in its answer to Thomas' complaint as first amended that it had relied in good faith) and ruled on the contrary for the first time that the Administrator would thereafter interpret the Fair Labor Standards Act to cover workers producing local materials for facilities of interstate commerce, Hempt Brothers immediately complied with that revolutionary ruling and thereafter paid Thomas time and a half for any week when he worked over 40 hours. That is the very reason that Thomas' suit is restricted (Transcript of Record, pages 3 to 11) to a period prior to April 15, 1945. By the instant demurrer, to the re-amended complaint, raising preliminarily the question of law on which petitioner now invites the Supreme Court of the United States to rule, Hempt Brothers did not under the applicable Pennsylvania Rules of Civil Procedure waive the defenses heretofore raised by answer to the prior amended complaint. Such defenses, including good faith reliance on the Administrator's prior rulings, would be pleaded in due course were this court to rule in Thomas' favor, as requested in this petition, on one of the several elements in the case.

In addition, Hempt Brothers filed, along with the demurrer in question, other preliminary objections.

Argument

Were this court to reverse, on the issue presented by the demurrer, the issues presented by the other preliminary objections to Thomas' re-amended complaint would then have to be decided by the Court of Common Pleas of Cumberland County, Pennsylvania. One of those issues is whether the Fair Labor Standards Act covers new construction. The re-amended complaint (Transcript of Record, page 4, paraphrased in part in the petition at page 4) averred obvious new construction, for example, that sand, stone or cement produced or mixed by Thomas at the Hempt quarry was used, inter alia, by " * * * the contractor engaged in laying and building the Pennsylvania Turnpike, * * *" This court has ruled original construction outside the bounds of the Act: *Murphy v. Reed, et al., doing business as M. T. Reed Construction Company*, 335 U.S. 865, 69 S. Ct. 105.

Patently, this is not the proper vehicle for a test case on coverage of quarry employees producing local materials for local use, for the litigation would not be determined, unless this court affirmed, which would not help petitioner.

(3)

The Supreme Court of Pennsylvania properly affirmed a judgment for Hempt Brothers, on the pleadings, under the applicable Pennsylvania practice. Petitioner's fifth specification, concerning such a judgment on the pleadings presents no substantial federal question. No constitutional right to trial by jury was denied. Thomas had ample opportunity to amend. The

demurrer on which judgment was entered was directed to a re-amended complaint. The trial court indeed authorized Thomas to file a further amended complaint (Transcript of Record, page 16) but Thomas did not choose to do so. In *Thomas v. Hempt Brothers*, 74 Pennsylvania District and County Reports 213, 214, 215, 217, the trial court held insufficient Thomas' prior amended complaint baldly averring (without setting forth the exact nature of his work) that his work was in interstate commerce, and admonished (at page 217) that under the Pennsylvania system of fact pleading:

"The whole purpose of our practice in permitting motions in the pleading stage is to clarify the issues and to permit the disposition of cases on which there is no basis for recovery and thus avoid the necessity of a trial."

No such situation was presented in petitioner's (page 7) summary remand cases.

The Supreme Court of Pennsylvania (Transcript of Record, page 18, 371 Pa. at 385), in holding insufficient the present re-amended complaint, pointed out that Thomas had been given every opportunity to plead facts, if such existed, stating a cause of action under the Fair Labor Standards Act. This was a most fitting case for a familiar exercise of undoubted judicial power to enter judgment on the pleadings.

(4)

On the legal issue which petitioner would have this court decide the Supreme Court of Pennsylvania

Argument

reached a correct conclusion (distinguishing at page 395 of 371 Pa., Transcript of Record, page 26, the decision of this court in *Roland Electrical Company v. Walling*, 326 U.S. 657, from which petitioner at page 8 quotes in closing) in view of the refusal of this court in *McLeod v. Threlkeld*, 319 U.S. 491, 494, 497 to extend the conception of "in commerce" beyond the employees "engaged in actual work upon the transportation facilities," and in view of the inference, that later received congressional confirmation (see Conference Report No. 1456 on Amendments to the Fair Labor Standards Act, 81st Cong., 1st Sess., 1949, U.S. Code Congressional Service, vol. 2, pp. 2251, 2252-2254), drawn in *E. C. Schroeder Co., Inc. v. Clifton*, 153 F. 2d 385, 390 (C.C.A. 10, 1946), cert. den. 328 U.S. 858, that

"If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention. We fail to find anything in the language of the Act or its legislative history which lends support to the view that Congress proposed to bring workmen of that class within the coverage."

Accordingly, this is not an appropriate case for review by the Supreme Court of the United States.

CONCLUSION

This Petition for Writ of Certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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